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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF PATTERSON,

Plaintiff, Cross-Defendant and
Respondent,

v.

PATTERSON HOTEL ASSOCIATES, et al.,

Defendants, Cross-Complainants and
Appellants.

F074038

(Super. Ct. No. 670042)

OPINION

APPEAL from an order of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Michael S. Warda for Defendants, Cross-Complainants and Appellants.

Churchwell White, Thomas P. Hallinan, Barbara A. Brenner and Nubia I.

Goldstein for Plaintiff, Cross-Defendant and Respondent.

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Defendants, cross-complainants and appellants Patterson Hotel Associates, LLC (“PHA”) and Dominic Speno seek review of the trial court’s order awarding attorney’s fees to plaintiff, cross-defendant and respondent, the City of Patterson.

Briefly stated, the City prevailed on its complaint against PHA and Speno, as well as on all claims alleged in Speno's cross-complaint against the City. The trial court awarded the City attorney's fees for work performed on the cross-complaint pursuant to contract and Civil Code section 1717, without apportioning fees between Speno's contractual and non-contractual claims. On appeal, Speno contends the court erred in awarding any fees because all the claims alleged in the cross-complaint are related by inextricable overlap to his inverse condemnation claim, which is subject to a unilateral fee-shifting provision favoring only prevailing plaintiffs. (Code Civ. Proc. § 1036.)¹ According to Speno, this unilateral fee-shifting provision bars the City, as cross-defendant, from recovering attorney's fees for any work that overlaps with the inverse condemnation claim. To the extent the claims do not overlap, Speno argues the City's block-billing practices render impossible any reasoned apportionment of attorney's fees.

We agree with Speno that the trial court erred in failing to exclude attorney's fees for work performed on the inverse condemnation claim. We therefore reverse the order awarding attorney's fees and remand for further proceedings, as explained below.

FACTUAL AND PROCEDURAL BACKGROUND

The trial court's underlying judgment was not appealed and the factual findings set out in its statement of decision are unchallenged. We therefore base our factual summary on those findings, which we accept as established.

In 1990, Speno submitted to the County of Stanislaus ("County") an application for a development project known as "Villa Del Lago" or "Patterson Gateway" (the

¹ "In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding." (Code Civ. Proc., § 1036.)

“Project”) in a then-unincorporated part of the County, outside the City of Patterson (“City”). The Project was to involve several commercial entities, including a Best Western Hotel. The City, which had been subject to severe flooding downstream of the Project property, demanded that Speno implement a regional flood control solution by restricting the flow of Black Gulch Creek, a creek passing through the property. In 1992, the County Planning Commission approved the parcel map to allow for development of the project, with two conditions pertaining to storm water drainage.

Eventually, Speno decided to finance, design, and construct the requisite flood control improvements on “a rather significant portion of his own property.” In 1996, he and the County entered into an agreement entitled “Agreement and Covenant Relating to Salado Creek Flood Control – Patterson Gateway” (“Salado Creek Agreement”). The Salado Creek Agreement provided in relevant part that Speno:

“Shall be entitled to a credit against the Property’s allocable fair share of any such special district assessment for the value of easements dedicated and for improvement costs incurred in the design and construction of permanent facilities incorporated into the regional system and shall be entitled to reimbursement in the event said dedications and improvement costs incurred exceed their fair share allocation. (emphasis added)”

Speno later constructed the required improvements. The City eventually annexed the subject property from the County. Although Speno approached the City many times regarding reimbursement under the Salado Creek Agreement, he received no reimbursement from either the City or County. On September 21, 2011, the city manager informed Speno that the city council and city attorney had instructed him not to discuss reimbursement with Speno.

Approximately two weeks later, the City filed a complaint against PHA and Speno for \$237,147.86 in delinquent transient occupancy taxes from the Best Western Hotel built as part of the Project and operated by PHA and Speno.

Speno brought a cross-complaint against the City for (1) breach of the reimbursement provision of the Salado Creek Agreement, (2) breach of the covenant of good faith and fair dealing by refusing to create an assessment district or other vehicle to pay for the Project improvements, while at the same time forming other districts for regional storm water improvement and not including Speno in those districts, (3) inverse condemnation for the taking of his real property resulting from the construction and dedication of the improvements, and (4) breach of the Subdivision Map Act by failing to compensate him for what he characterized as “over-sized improvements.” “One of the more fundamental arguments presented by the City” in response to these claims was that the Salado Creek Agreement contained a condition precedent requiring the City to create “an assessment district or other vehicle to finance and construct facilities to implement the ultimate regional solution to the Salado Creek drainage” before the reimbursement provision could be triggered. The City argued that this condition had not been satisfied and the reimbursement provision therefore remained conditional and contingent.

Following a lengthy bench trial, the trial court ruled in favor of the City on all claims and cross-claims. With regard to Speno’s breach of contract claim, the court concluded that the Salado Creek Agreement contained a condition precedent – “i.e., the establishment of a special assessment district for the construction of a regional solution to the Salado Creek flooding problem – before any fair share allocation could be potentially allotted to Mr. Speno.” The court concluded this condition was not met and the City therefore did not breach the contract. The court also concluded the City did not breach the covenant of good faith and fair dealing because there was no evidence the City had not exercised its discretion (to determine necessary infrastructure projects) in good faith. The court rejected the inverse condemnation claim on three grounds: (1) the claim was untimely, (2) Speno voluntarily dedicated the easement and flood control improvements to the public, and (3) there was no physical taking in part because there was no triggering of the Salado Creek Agreement’s fair share allocation provision without the

establishment of a special assessment district. Finally, the court rejected Speno's claim for breach of the Subdivision Map Act because it was untimely and, in any event, Speno was not required to construct, and did not construct, oversized improvements that would implicate the Subdivision Map Act.

Following entry of judgment, the City moved for an award of attorney's fees in the amount of \$1,000,509.50, as well as additional fees incurred in bringing the motion. The City argued it was entitled, as the prevailing party, to an award of reasonable attorney's fees pursuant to the Salado Creek Agreement and Civil Code section 1717. The City also argued the fee provision in the Salado Creek Agreement was broad enough to encompass Speno's contract and non-contract claims, and it therefore was unnecessary to apportion fees between those claims. The City claimed all four of Speno's cross-claims were "inextricably intertwined" because they all stemmed from obligations under the Salado Creek Agreement. The City did not seek attorney's fees for work relating to its complaint for transient occupancy taxes.²

In opposition, Speno agreed with the City that the cross-claims were "inextricably intertwined" but argued that this overlap precluded the City from recovering any attorney's fees. Speno pointed out that Code of Civil Procedure section 1036 provides for unilateral fee-shifting in inverse condemnation claims for the benefit solely of a prevailing plaintiff. He argued that, pursuant to *Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498 (*Carver*), a prevailing defendant is barred from recovering fees for work that overlaps with work performed on a claim subject to unilateral fee-shifting.

² The City therefore reviewed its billing and excluded entries for work performed solely on the complaint. It also attributed 52% percent of its discovery billing to the complaint based on the number of written discovery requests, and attributed 15% of the trial billing to the complaint based on the overall number of days of trial spent on the complaint. It also manually allocated certain hours between the complaint and cross-complaint based on an attorney review.

Alternatively, Speno argued the amount of fees requested was unreasonable and excessive.

The trial court ultimately awarded the City \$673,660 in attorney's fees. The court reduced the hourly rate for attorney and paralegal time requested by the City, declined to impose a multiplier, and reduced the time claimed by 20% "as a result of the uncertainties created by Plaintiff's attorney's block billing practices." With regard to the basis for the fee award, the court stated:

"The Court finds that the 'predominant legal theory' upon which the parties litigated the Defendant's Cross-Complaint related to the applicability of the Agreement and Covenant Related to Salado Creek ("Agreement") to the improvements made to Defendants' property. While the Cross-Complaint did contain a cause of action for inverse condemnation, that cause of action was not predominant. Therefore, the reciprocal fee-shifting provision set forth in the Agreement applies here and City is entitled to an award of attorney's fees as the 'successful party' in an action to enforce the Agreement."

This timely appeal of the order on the City's motion for fees and costs followed.

DISCUSSION

The parties do not dispute that the City was the prevailing party in the underlying litigation or that the parties were subject to a reciprocal fee-shifting provision based on the Salado Creek Agreement and Civil Code section 1717. However, as in the trial court, Speno argues the City cannot recover attorney's fees for work performed on the contractual claims because that work is "inextricably intertwined" with work on the inverse condemnation claim. Speno maintains that the unilateral fee-shifting provision applicable to inverse condemnation claims bars recovery of fees by a prevailing defendant on any overlapping claims. Speno further argues that the City's block billing practices render impossible any reasoned apportionment of fees between work that is compensable and work that is not.

We review de novo a trial court's determination of the legal basis for an attorney's fee award. (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378 (*Carpenter*).) Doing so here, we agree with Speno that the City cannot recover fees for work that is related by inextricable overlap to the inverse condemnation claim. We therefore conclude that the trial court erred in failing to apportion fees between compensable and non-compensable work. As we explain, we remand for the trial court to consider the issue of apportionment in the first instance.

A. Effect of a Unilateral Fee-Shifting Statute on a Reciprocal Fee Agreement

“In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.” (Civ. Code, § 1717, subd. (a).) The basic rules governing entitlement to reciprocal contract fees were established decades ago in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds*). “Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under section 1717 only as they relate to the contract action.” (*Id.* at p. 129.) At the same time, however, a “plaintiff's joinder of causes of action should not dilute its right to attorney's fees. Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.” (*Id.* at pp. 129-130.) In other words, the court generally is not required to apportion attorney's fees between compensable and non-compensable claims when those claims overlap.

This general rule must, however, give way where an award of fees “would impair legislative policies implicated by” other claims for which fees are unavailable. (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1056; see Code Civ. Proc., § 1021 [compensation of attorney

is left open to agreement of parties “expect as ... specifically provided for by statute”].) Accordingly, courts have found exceptions to the *Reynolds* rule where a compensable claim overlaps with a claim that is subject to a statute with a unilateral fee-shifting provision. (*Carver, supra*, 119 Cal.App.4th at p. 504 [defendant could invoke a contract’s attorney’s fee provision only for work allocable to non-Cartwright Act claims because claims under the Cartwright Act involved a unilateral fee provision]; *Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, 1190-1191 (*Wood*) [defendant could not recover attorney’s fees where contract claims overlapped with claims under elder abuse statute with unilateral fee-shifting provision].)

Courts have recognized that unilateral fee-shifting provisions reflect the Legislature’s intent to encourage “ ‘injured parties to seek redress—and thus simultaneously enforce public policy—in situations where they otherwise would not find it economical to sue.’ ” (*Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1060 (*Turner*), quoting *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 324-325 (*Covenant*).) “A fee award to a prevailing defendant in that context ‘obviously would frustrate the legislative intent to allow more injured people to seek redress and to encourage improved enforcement of public policy.’ ” (*Turner, supra*, at p. 1060; *Covenant, supra*, at p. 328 [a fee award to a prevailing defendant on a claim with a unilateral fee-shifting provision would “discourage the meritorious as well as the frivolous lawsuit and thereby defeat the legislative goal of encouraging the redress of grievances and enhancing the enforcement of public policy”].)

In *Carver*, the defendant prevailed on contract claims and claims under the Cartwright Act, which contains a unilateral attorney’s fee provision. (*Carver, supra*, 119 Cal.App.4th at p. 501.) The Court of Appeal held the defendant could invoke the contractual attorney’s fee provision solely for work allocable to the non-Cartwright Act claims. The court reasoned the Cartwright Act’s nonreciprocal attorney fee provision “prohibits an award of attorney fees for successfully defending Cartwright Act and non-

Cartwright Act claims that overlap. To allow [the defendant] to recover fees for work on Cartwright Act issues simply because the statutory claims have some arguable benefit to other aspects of the case would superimpose a judicially declared principle of reciprocity on the statute's fee provision, a result unintended by the Legislature, and would thereby frustrate the legislative intent to 'encourage improved enforcement of public policy.' ” (*Id.* at p. 504.)

Carver is on point. The unilateral fee-shifting provision applicable to inverse condemnation claims prohibits an award of attorney's fees to the City, as prevailing cross-defendant, to the extent the inverse condemnation and contractual claims overlap. We reject the City's argument that *Carver* is distinguishable because it turned on the trial court's determination that the Cartwright Act claims were the “predominant legal theory” in the case.³ While it is true that the trial court in *Carver* found the Cartwright Act claims predominated, this finding did not drive the appellate court's conclusion that work on those claims was not compensable. (*Carver, supra*, 119 Cal.App.4th at p. 504.) The rule in *Carver* is clear: attorney's fees may not be awarded on a contract where those fees were incurred for work that overlaps with a claim subject to a unilateral fee-shifting statute. To hold otherwise would contravene the intent of the Legislature and its reasoned policy determinations in permitting unilateral fee recovery. (*Ibid.*; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2017) ¶ 17:164.11a, pp. 17-188 to 17-189 [“When *defendant* prevails in a suit containing causes of action for both breach of contract and violation of ... a statute [allowing attorney's fees only to a

³ The City repeatedly justifies its position through use of the phrase “predominant legal theory,” as though this denotes a known legal standard or term of art. The trial court's order on the attorney's fees motion also uses this phrase. It apparently originates from *Carver*, where it was used to summarize the argument of one of the parties in the trial court. (*Carver, supra*, 119 Cal.App.4th at p. 503.) We find no other reference to this phrase in the case law, and no authority to support the City's contention that a fee provision governing the “predominant legal theory” determines whether fees may be awarded for otherwise non-compensable claims.

prevailing plaintiff], the contractual attorney fees clause ... cannot be used to award defendant its fees attributable to the statutory action ... because doing so would effectively allow the contract to override the statute.”].)

We also reject as inapposite the City’s reliance on the Fourth District Court of Appeal’s recent decision in *Hoffman v. Superior Ready Mix Concrete LP* (Dec. 19, 2018, D072929) __ Cal.Rptr.3d__ (2018 WL 6629519). *Hoffman* applied the *Reynolds* rule to conclude there was no need to apportion fees between successful fee claims and unsuccessful nonfee claims when awarding fees to a *prevailing plaintiff*. (*Id.* at *7.) As we have explained, *Carver* creates an exception to this general rule when a unilateral fee-shifting statute prohibits an award to a *prevailing defendant*. *Hoffman* noted this distinction and thus, to the extent it is relevant, merely reinforces the applicability of the *Carver* rule to the circumstances presented here.

The City also urges us to find the fees recoverable under *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 (*Abdallah*). There, the court awarded attorney’s fees for time billed in connection with the defense of recoverable breach of contract claims, even though the fee request included work common to a non-recoverable tort claim brought under the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”). (*Id.* at p. 1105.) Although not discussed in *Abdallah*, the City points out that RICO claims are subject to a unilateral fee-shifting provision that benefits only prevailing plaintiffs. (18 U.S.C. § 1964, subd. (c).) However, *Abdallah* preceded *Carver*. Additionally, it does not appear that the unilateral fee-shifting provision of RICO was raised by the parties in *Abdallah* as a bar to the award of fees, and the court did not address this issue. It is axiomatic that a decision does not stand for a proposition not considered by the court. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343.) We are therefore unpersuaded that *Abdallah* compels us to reach a contrary result. We reiterate that the reasoning of *Carver* applies here.

Here, the trial court determined the City was entitled to fees because the applicability of the Salado Creek Agreement was the “predominant legal theory” in the case and the inverse condemnation cause of action “was not predominant.” Although not entirely clear, it appears the court awarded fees for work performed on all the claims, without excluding work performed on the inverse condemnation claim. In so doing, the court appears to have relied on the general principle, articulated in *Reynolds*, that attorney’s fees need not be apportioned when incurred for representation on an issue common to a compensable claim and one in which they are not allowed. (*Reynolds*, *supra*, 25 Cal.3d at pp. 129-130.) However, as explained above, this rule does not apply where “an award of fees for all hours spent on the compensable claim would conflict with a statutory unilateral fee-shifting provision.” (*Turner*, *supra*, 193 Cal.App.4th at p. 1072; see *Carver*, *supra*, 119 Cal.App.4th at p. 505 [“*Reynolds* is distinguishable because it did not involve a conflict between a contractual right to attorney fees and a statutory prohibition against awarding such fees.”].)

Because the court did not exclude attorney’s fees for work performed on the inverse condemnation claim, the award of attorney’s fees must be reversed.

B. Apportionment and Effect of Block Billing

As we have now made clear, attorney’s fees incurred by the City to defend against the inverse condemnation claim are not compensable. (Code Civ. Proc., § 1036.) Additionally, to the extent fees were incurred for work on contractual claims that are “related ... by ‘inextricable overlap’ to” the inverse condemnation claim, those fees also must be excluded from the fee award. (*Carver*, *supra*, 119 Cal.App.4th at p. 506.) However, Speno argues apportionment of fees between compensable and non-compensable claims is impossible or impracticable here because (1) all of the fees incurred in defense of the cross-complaint overlap with the inverse condemnation claim, and (2) the City’s block billing practices do not distinguish between compensable and

non-compensable time. Accordingly, Speno requests an order directing the trial court to deny all fees.

The City argued below that all work performed on the cross-complaint is related by inextricable overlap to the inverse condemnation claim. However, the trial court made no finding in this regard, nor did it indicate that apportionment would be impossible or impracticable. It also is not immediately apparent from the record whether the claims are inextricably interwoven. In trial briefing, the City argued the inverse condemnation claim failed on the merits simply because the County's imposition of flood mitigation conditions as a requirement for approval of the Project did not constitute a taking. On its face, this argument does not appear to overlap with the breach of contract claim. Nevertheless, in ruling for the City on the cross-complaint, the trial court concluded, "There can be no physical taking in part because the Court finds there was no triggering of the Agreement for fair share allocation without the establishment of a special assessment district." Thus, the trial court's ruling appears to be based, at least in part, on overlap of these claims. It therefore is not apparent based upon the existing record whether the claims are inextricably interwoven, or whether the result of the breach of contract claims merely had an arguable incidental benefit to the City's defense of the inverse condemnation claims.

Ordinarily, the apportionment of attorney's fees is a decision reserved to the discretion of the trial court, and a trial court's factual findings are entitled to substantial deference. (*Carpenter, supra*, 195 Cal.App.4th at p. 378.) Here, however, the trial court applied an incorrect rule of law and therefore did not make relevant factual findings regarding the overlap of claims, nor did it exercise its discretion to apportion fees between the compensable and non-compensable claims. The trial court, with its superior understanding of the litigation, is in the best position to determine in the first instance whether the contractual claims and inverse condemnation claim overlap, or whether the claims are otherwise so intertwined that it would be impracticable or impossible to

separate the attorney's time into compensable and non-compensable units. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [“ ‘The “experienced trial judge is the best judge of the value of professional services rendered in his court” ’ ”].)

Accordingly, we will remand for the trial court to make these determinations.

We note that the record does not reflect whether the City undertook any attempt to exclude fees for work performed on the inverse condemnation claim.⁴ It remains the City's burden to produce records sufficient to provide a basis for determining how much time was spent on particular claims. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020.) If, on remand, the City is unable or unwilling to meaningfully separate the attorney's fees incurred in litigating contractual claims from the attorney's fees incurred in litigating the inverse condemnation claim, the trial judge, in his discretion, may use his experience and his knowledge of the case to apportion a percentage of the attorney's fees to the contract claims, to otherwise assign an appropriate fee to the contract claims, or to determine no fees should be awarded.

Lastly, we address Speno's contention that the City's block billing format prevents any reasoned apportionment of fees. Most of the billing statements submitted as part of the City's motion list all tasks performed by each attorney and the total time spent on the litigation on a particular day, but do not specify the time spent on each task. (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010 [describing block billing].) This type of block billing “is not objectionable ‘per se,’ ” but trial courts retain wide discretion to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not. (See *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830; *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1324-1325; *Bell v. Vista Unified School Dist.* (2000)

⁴ As noted above, the City was able to devise a procedure for excluding work performed on the transient occupancy tax claim.

82 Cal.App.4th 672, 689 (*Bell*).) In such cases, “[i]f counsel cannot further define his billing entries so as to meaningfully enlighten the court of those related to the [compensable claim], then the trial court should exercise its discretion in assigning a reasonable percentage to the entries, or simply cast them aside.” (*Bell, supra*, at p. 688.) The trial court has already exhibited its familiarity with this principle by discounting the fees by 20% “as a result of the uncertainties created by Plaintiff’s attorney’s block billing practices.” On remand, it remains within the trial court’s discretion to determine whether the block billing prevents a reasoned apportionment of fees. (See *Carpenter, supra*, 195 Cal.App.4th at p. 378.)

DISPOSITION

The March 8, 2016 order awarding the City attorney’s fees in the amount of \$673,660 is reversed. The matter is remanded for the trial court to determine the extent to which the contractual claims are related by inextricable overlap to the inverse condemnation claim, to exclude from the fee award all work on such overlapping claims, and to redetermine the amount of attorney’s fees to which the City is entitled, if any. Patterson Hotel Associates, LLC and Speno are entitled to their costs on appeal. (California Rules of Court, rule 8.278(a)(1).)

SNAUFFER, J.

WE CONCUR:

SMITH, Acting P.J.

DE SANTOS, J.